Quarterly Report

of the

ATTORNEY GENERAL

of

ALABAMA

For The Period

From April 1, 1957

Through June 30, 1957

VOLUME 87

JOHN PATTERSON, Attorney General

1957

QUARTERLY REPORT

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TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from April 1, 1957, through June 30, 1957, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama, 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

JOHN PATTERSON,
Attorney General.

JOHN PATTERSON
Attorney General

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OPINIONS

April 3, 1957

Hon. Joseph M. Hocklander
City Attorney
City of Chickasaw
Mobile County
Chickasaw, Alabama

Mayor—Municipalities.

1. Under the facts stated, the City Council of the City of Chickasaw is authorized to appoint the members of the City Police Department.

2. Under the facts stated, the City Council of the City of Chickasaw is authorized to appoint the members of the City Fire Department.

3. Under the facts stated, the Mayor of the City of Chickasaw is authorized to employ the General Maintenance Inspector of such city.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of March 15, 1957, is as follows:

"I will within the next few days be called upon to rule for the City of Chickasaw on the question of whether the mayor or the council has the authority to hire certain employees of the city. I am aware that your office does not have facilities for answering theoretical questions which are presented to you and must of necessity devote your time to answering questions which have an immediate practical effect on the city's operation. However, should I wait until an actual controversy over the power of appointment arises the city would be without the services of important employees for a period of time while we waited on your ruling. Chickasaw's annual budget permits the employment of very few people and the loss of even one of the city employees for a period of several weeks will seriously effect the city's operation. For this reason it is my hope you will answer the following questions at this time.

"I am concerned immediately with the appointment of the general maintenance man for the City of Chickasaw. His actual title I believe is General Maintenance Inspector and his duties involve supervision of the city street and sewage repair work as well as the city's garbage

collection and various other work of this nature. He is in charge of the city's employees who are responsible for the general upkeep around the city and work of every nature other than police, fire and office work. His job was created by the council, and the ordinance creating his position was silent as to his method of appointment.

"There are also several positions in our police and fire departments which must be filled within the next week or so, and the ordinances creating our police and fire departments are also silent as to the authority for appointing men for this type of work.

"Section 441 of Title 37 provides that the mayor shall have the power to appoint all officers whose appointment is not otherwise provided by law. Section 429 of the same title, sub-paragraph 10, gives the council the power to establish and organize the police force. It would appear from Section 429 that the council would have the authority for appointing a Chief of Police and also for appointing the police officer who serves under him and probably the city firemen. However, I am wondering whether or not, in order to exercise this authority, the council, in creating or establishing a police force, must also provide for the manner of filling vacancies or appointing men to the police force or fire department. Generally speaking, my question is, 'Where the council creates a job pursuant to the authority granted them by the Code of Alabama and fails to designate the person or group with authority to appoint the person who is to fill the job, does this job come within the provisions of Section 441 as an appointment which is not otherwise provided by law?' I shall appreciate your opinion as to whether the mayor or the city council has the power of appointment under the general circumstances described above and specifically as to the General Maintenance Inspector of the City of Chickasaw, and members of the police and fire departments.

"All ordinances creating these last mentioned jobs are silent as to the appointing authority."

Title 37, Section 407, Code of Alabama 1940, authorizes a municipal council to provide for a chief of police, chief of the fire department and certain other municipal officers.

Title 37, Section 429, Code of Alabama 1940, reads, in part, as follows: "§ 429. Powers and duties of council in general.—All legislative powers and other powers granted to cities and towns shall be exercised by the council, except those powers conferred on some officers by law or ordinance. They shall perform the duties required in this title, including the following:

* * * *

"10. Except as otherwise provided, they shall have power to establish

a police force and to organize the same under the general supervision of the chief of police, and to provide one or more station houses, and to require all things necessary for the maintenance of an efficient police department."

Section 429, supra, vests control of the police force in the municipal council. I am of the opinion that such council must appoint the members of the police department unless the power to make such appointment is delegated by ordinance to the chief of police.

Therefore, under the facts stated in your request, I am of the opinion that the City Council of the City of Chickasaw is authorized to appoint the members of the City Police Department. Cf. **Beasley v. McCorkle,** 237 Ala. 4, 184 So. 904, and Quarterly Report of Attorney General, Vol. 67, page 55.

Title 37, Section 450, Code of Alabama 1940, reads as follows:
"§ 450. Power to maintain and operate fire department.—Cities and towns may maintain and operate a volunteer or paid fire department, and may do any and all things necessary to secure efficient service.

The council may delegate to commissioners by ordinance the power to control and manage such fire department under such rules and regulations as the commissioners or the council may prescribe."

I am of the opinion that Section 450, supra, authorizes a municipal council to appoint the members of the fire department unless such power is delegated by ordinance as prescribed by said section.

Therefore, I am of the opinion that, under the facts stated in your request, the City Council of the City of Chickasaw must appoint the members of its fire department.

Although Title 37, Section 429, Subsections 8 and 9, Code of Alabama 1940, authorizes the employment of a general maintenance inspector, this statute is silent as to who has the duty of employing the person to fill this position.

Title 37, Section 441, Code of Alabama 1940, reads, in part, as follows:
"§ 441. Mayor is chief executive; general supervision and control.—The mayor shall be the chief executive officer, and shall have general supervision and control of all other officers and the affairs of the city or town, except as herein otherwise provided; he shall have the power to appoint all officers, whose appointment is not otherwise provided for by law. . . ."

Under the facts stated in your request, I am of the opinion that Sec-

tion 441, supra, authorizes the Mayor of the City of Chickasaw to employ the City General Maintenance Inspector.

Yours very truly,

JOHN PATTERSON
Attorney General

April 16, 1957

Hon. J. A. Logue
Judge of Probate
Houston County
Dothan, Alabama

Counties—Houston County—Judges of Probate.

1. Where there is a meeting of the Board of Revenue of Houston County and a quorum is present, a majority of the quorum vote in favor of a measure will prevail, although an equal number refrain from voting.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of March 13, 1957, is as follows:

"At our regular Board of Revenue meeting on Monday, March 11, 1957, the four members of the Board of Revenue and the Probate Judge as member and chairman of the Board were all present. A Motion was made to appoint and elect a County Engineer for Houston County, Alabama. Two members of the Board of Revenue abstained from voting and two of the members of the Board gave an affirmative vote. The chairman of the Board gave an affirmative vote. Please refer to Attorney General Opinions, February and March, 1943, Volume 30, Page 16, and advise me as follows:

"1. Where all four members of the Board of Revenue are present, two members give an affirmative vote and two members abstain from voting, does the chairman in that event have a vote, and if not, does the two member affirmative vote legally carry the question?"

To answer your question, I refer to the following citations:

Title 12, Section 8, Code of Alabama 1940:

"The court may be held by the judge of probate and two commissioners, or with three commissioners without the judge of probate."

Title 12, Section 21, Code of Alabama 1940:

"In all matters where the court is divided, the same must be determined by the judge of probate."

The parliamentary rule on voting procedures, as set forth in **Rushville Gas Co. v. Rushville**, 23 N. E. 72, is as follows:

". . . the rule is that if there is a quorum present, and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting."

See also, **Attorney General v. Shephard**, 62 N. H. 383, **U. S. v. Ballin**, 144 U.S. 1, 36 L. Ed. 321, and **In re Opinion of the Justices**, 228 Ala. 140, 152 So. 901.

In the case of **In re Opinion of the Justices**, supra the question of an abstaining member of the Senate arose. The Senator abstained on an agreement with an absent Senator to pair their votes on a question. The Court held:

* * *

"The effect of his 'pair' is that for that occasion, he is absent.

"Reference is made in that case to the uniform rule that 'when a quorum is present, the act of a majority of the quorum is the act of the body.'" (**U. S. v. Ballin**, supra)

Based on the above rules and citations of authority, it is my opinion that the Probate Judge was not entitled to a vote on this question and the resolution passed because a majority of the quorum voted in the affirmative.

In the Biennial Report of Attorney General, 1922-1924, page 439, a misleading principle of parliamentary procedure was set out. That opinion insofar as it conflicts with this opinion is hereby overruled.

The opinion of the Attorney General, referred to in your letter, will not answer your question. This opinion was issued for a case where the abstaining members were disqualified by relation or personal interest. They were not true "abstainers." That is, they did not refrain voluntarily from voting. The opinion was based on the authority of **Garrison v. Sumners**, 223 Ala. 17, 134 So. 675, which held, in effect, that the related or personally interested members of the Board are disqualified and may not even ". . . .

sit as members of the court when considering or voting upon any county contract with any person so related to the individual member. . . ." Thus, the only persons legally present and eligible to vote are those not related to the persons involved in the contract.

It is my opinion, therefore, that where all five members of the Board of Revenue of Houston County were present and two votes were in the affirmative with two members abstaining, the resolution or motion was passed by a two-to-nothing vote and there is no tie to be determined by the Judge of Probate.

Very truly yours,

JOHN PATTERSON
Attorney General

May 30, 1957

Honorable James Record
County Auditor & Clerk
Madison County Board of Commissioners
P. O. Box 589
Huntsville, Alabama

Counties—Madison County—Gasoline—Gasoline Fund—Roads and Bridges—Road and Bridge Fund—Constitutional Amendments.

1. A portion of the salaries of members of the Madison County governing body may be paid from the county's share of state gasoline tax funds as provided in Act. No. 838, General and Local Acts 1953, page 1129.

2. No road and bridge fund money arising from the levy authorized by Section 215, Constitution of Alabama 1901, or from the Special Buildings, Bridges and Road Fund created by Act No. 370, Local Acts 1945, page 175, may be used for payment of salaries of members of Madison County governing body.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of May 20, 1957, is as follows:

"Please render us your opinion on the following question: 'Can a part

of the salary of the Board of County Commissioners of Madison County be paid from the proceeds of either or any of the following; State Gasoline Tax, Public Building, Bridge and Road Fund, County Gasoline Tax (Local Act 1945, Act 370)?'

"Act Number 19, Local Acts of 1923, created the Board of County Commissioners of Madison County, and section 7 states that the salary of the Board shall be paid from the County Treasury. This act was amended by Act Number 324, Local Acts of 1923, but said amending act did not change the provisions of the salary payment.

"Act Number 838, General Acts of 1953, however, states as follows: Section 1. That in all counties wherein members of the County governing bodies are compensated on a salary basis, said governing bodies may, in their discretion, pay a part of said salary out of the county gasoline tax revenues, etc. (Remainder of act gives method to follow in doing this)

"We anticipate a shortage of general fund revenue this year, and will appreciate your early reply."

In the absence of constitutional prohibition, the Legislature has the authority to designate the fund or funds from which the compensation or salaries of members of county governing bodies shall or may be paid. **Sheppard v. Dowling,** 127 Ala. 1, 28 So. 791.

The Supreme Court of Alabama held in **Weaver v. Tidwell,** 228 Ala. 169, 153 So. 218, that the Commissioners' Court of Winston County was unauthorized to make the per diem and mileage of members of the county governing body a charge against the special road and bridge fund created from the county's share of the gasoline tax, as provided by the General Acts of 1931, page 458. This for the reason that the law, as then existing, made provision for said compensation as a charge against the general fund.

Subsequent to the decision in the above case, the law was changed to provide for payment of the per diem and mileage from the gasoline tax when the members were engaged in supervising the construction, improvement and maintenance of highways, bridges and streets. Act No. 157, General Acts, Extra Session, 1936-37 at page 179. The legality of such payment from the gasoline tax was upheld by this office in Quarterly Report of Attorney General, Vol. 10, page 196.

Similar provisions to those contained in Act No. 157, supra, now appear in Section 647, Title 51, Code of Alabama 1940, as last amended by Act No. 44, General and Local Acts 1955, page 73; and Act No. 880, General and Local Acts 1953, page 1182.

In addition, Section 1 of Act No. 838, General and Local Acts 1953, page 1129, provides as follows:

> "Section 1. That in all counties wherein members of the county governing bodies are compensated or paid on a salary basis, said county governing bodies may, in their discretion, pay a part of said salary out of the county gasoline tax revenues, provided, however, that the part of said salary so paid out of the county gasoline tax revenues shall bear the same proportion to the total salary paid to said member as the time devoted by said member to supervising, inspecting, accepting, building or repairing county roads or bridges bears to the total time devoted by said member to all of his duties as a member of the county governing body, and provided, further, that such use of gasoline tax revenues shall be in accordance with and subject to all the provisions of Title 51, Section 655, Code of Alabama, 1940."

The latter part of the above section makes certain that the county gasoline tax revenues referred to in said section mean the counties' portion of the state gasoline tax, for Section 655, supra, deals with the state gasoline tax.

Amendment No. XCIII, Constitution of Alabama 1901, limits the use of the state gasoline tax to the cost of administration, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation and the expense of enforcing state traffic and motor vehicle laws. The amendment was proclaimed ratified November 19, 1952.

Since the laws providing for or permitting the payment of the per diem, mileage and salary of members of the county governing body from the county's share of the state gasoline tax have been passed or re-enacted since the adoption of Amendment No. XCIII, supra, it is evident that the Legislature considered such payment to be authorized as a part of the cost of construction, reconstruction, maintenance and repair of public highways and bridges. In this I agree. It results, therefore, that a part of the salary of the Board of County Commissioners of Madison County may be paid from the county's share of the state gasoline tax as provided in Act No. 838, supra.

I can find no authority, however, for making such payments from either the funds arising from the tax levied under authority of Section 215, Constitution of Alabama 1901, or those arising from the tax authorized by Act No. 370, Local Acts 1945, page 175. As to these funds, your question is answered in the negative. **Weaver v. Tidwll, supra.** Quarterly Report of Attorney General, Vol. 73, page 47, Vol. 70, page 35.

Yours very truly,

JOHN PATTERSON
Attorney General

June 10, 1957

Hon. John F. Watkins
Legal Counsel
Alabama League of Municipalities
24 South Hull Street
Montgomery, Alabama

Constitutional Amendments—Counties—Gasoline—Gasoline Fund —Municipalities—Road and Bridge Fund—Roads and Bridges.

A county may not appropriate funds to a municipality to be used for traffic control and street maintenance within the corporate limits of the municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of May 30, 1957, is as follows:

"Re: Appropriations from County Boards of Revenue to municipalities from gasoline tax receipts to be used for traffic control purposes and street maintenance purposes.

"Our municipalities are interested to know if County Boards of Revenue and other county governing bodies may lawfully appropriate funds to them (1) for traffic control and regulation purposes and (2) street maintenance purposes, either one or both, from gasoline tax receipts of the county. After studying Constitutional Amendment XCIII, Title 12, Section 129, Title 23, Section 129, Title 23, Section 43, and Title 51, Sections 655 and 657, of the Code of Alabama 1940, it appears to me that county governing bodies might appropriate funds from such revenues to municipalities for either of the foregoing purposes. I have been unable to find an Attorney General's Opinion ruling directly upon these questions; county governing bodies are reluctant to appropriate funds unless the authority for such appropriation is clear cut, and rightly so.

"We respectfully request your official opinion upon these questions for the benefit of the municipalities in Alabama. Your assistance with this matter will be appreciated."

Counties are agencies or subdivisions of the state and they have no inherent power. All of their authority is derived from the Legislature. **Newton v. City of Tuscaloosa**, 251 Ala. 209, 36 So. 2d 487.

The gasoline tax to which your request refers is levied by Title 51,

Section 647, Code of Alabama 1940, as amended by Act No. 44, General and Local Acts 1955, page 73. A part of the proceeds of this tax is distributed to the counties and municipalities in this state as prescribed by Title 51, Sections 655 and 657, as amended by Act No. 44, supra.

> Amendment No. XCIII, Constitution of Alabama 1901, reads as follows: "No moneys derived from any fees, excises, or license taxes, levied by the state, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and no moneys derived from any fee, excises, or license taxes, levied by the state, relating to fuels used for propelling such vehicles except pump taxes, shall be expended for other than cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws. The provisions of this amendment shall not apply to any such fees, excises, or license taxes now levied by the state for school purposes for the whole state or for any county or city board of education therein."

This amendment does not grant any authority to the counties but merely prohibits the Legislature from providing that the funds mentioned therein may be expanded in any manner other than that prescribed by said amendment. Cf. opinion to Hon. James Record, County Auditor and Clerk, Madison County, Huntsville, Alabama, under date of May 30, 1957.

I have found no statute which authorizes the counties of this state to appropriate receipts from the gasoline tax to municipalities to be used either to control traffic or to maintain streets. See Quarterly Report of Attorney General, Vol. 22, page 193. This office held in Quarterly Report of Attorney General, Vol. 62, page 45, that it is the duty of the municipality and not the duty of the county in which the municipality is located to maintain the streets within its corporate limits.

Therefore, I am of the opinion that a county may not appropriate receipts from the gasoline tax to a municipality to be used by it to control traffic and maintain streets within its corporate limits.

Yours very truly,

JOHN PATTERSON
Attorney General

June 13, 1957

Hon. H. L. Nelson
Highway Director
State of Alabama
Montgomery 4, Alabama

Condemnation—Eminent Domain—Highways and Highway Department.

The construction of an elevated highway imposes an additional servitude upon a public street and results in a taking of property rights of the abutting property owners with respect to light, air, and view for which reasonable compensation must be paid.

Opinion by Assistant Attorney General Kilgore.

Dear Sir:

Your request for an official opinion bearing date of April 23, 1957, is as follows:

"This Department is contemplating the construction of an elevated section of the Interstate Highway System along Tallapoosa Street in the City of Montgomery all of which will be within the limits of the dedicated Street. The existing Street at ground level will remain open to the traveling public. The elevated highway will be built in the form of a bridge approximately 32 feet high.

"The question arises as to whether or not this Department or the City of Montgomery will be liable for any damages such as the impairment of light and air that may have resulted from the construction of this elevated highway."

In answering your inquiry, consideration should be given to the question as to whether or not the owners of property abutting the street along which the elevated highway is proposed to be constructed have property rights in light, air, and view above said street and whether the construction of said elevated highway imposes an additional servitude and thereby constitutes a taking of any such rights for which just compensation must be paid.

Article 1, Section 23 of the Constitution of Alabama 1901, provides in pertinent part:

"Private property shall not be taken for or applied to public use unless just compensation be first made therefor . . . ."

Thus, if it be concluded that such abutting property owners have

property rights in air, light, and view, which would be taken by virtue of the construction of said elevated highway, compensation therefor would be required under the above constitutional provision.

Among the earliest cases considering the rights of abutting property owners under similar circumstances are the cases in the appellate courts of the State of New York, which cases related to the construction of elevated railroads and elevated viaducts for street purposes. The leading elevated railroad cases are **Story v. New York Elevated Railroad Company**, 90 N. Y. 122, 43 Am. Rep. 146, and **Lahr v. Metropolitan Elevated Railroad Company**, 104 N. Y. 268, 10 N. E. 528. These cases established the principles (1) that an elevated railroad was a perversion of the use of a street which neither the city nor the Legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners, (2) that the abutting owners had the right to free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon, which was an interest in real estate and constituted property within the meaning of the Constitution of the State and could not be taken for a special purpose without payment of compensation, (3) and that an elevated railroad in connection with its operation interrupted the free passage of light and air and constituted a taking of an easement requiring damage for such taking. The principles of these cases were affirmed by the Supreme Court of the United States in the cases of **Muhkler v. New York and Harlem Railroad Company**, 197 U. S. 544, 49 L. Ed. 872, and **Birrell v. New York, New Haven and Hartford Railroad Company**, 198 U. S. 390, 49 L. Ed. 1096. In the former case the court said:

> "In Barnett v. Johnson, 15 N. J. Eq. 481, there is a clear expression of the right of abutting owners to light and air . . . 'It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted; a right so strong that it protects itself, so urgent that upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions.'"

In this case the Court held that an easement for air and light was a property right and within the protection of the constitutional provision requiring compensation for its diminution by the contemplated structure of an elevated railroad.

Among the earlier cases, with respect to elevated viaducts for street purposes, is the leading case of **Sauer v. the City of New York**, 90 App. Div. 36, 85 N. Y. Supp. 636. In this case the elevated street was somewhat similar to the proposed elevated highway under consideration and the Court held:

> "The structure undoubtedly somewhat interferes with ingress and egress to and from plaintiff's premises and with light and the circulation of air, but in our opinion, these constitute damnum absque injuria . . . The

street overhead as well as the natural surface of the ground has been constructed and used exclusively for public travel and for ordinary street uses and purposes. At common law an abutting owner has no redress for the incidental damages sustained by him by any improvement made in the street to facilitate public travel therein, even though the improvement may consist of a serious change of grade of the street rendering his property inaccessible. In these cases he has no remedy unless the Legislature sees fit to authorize the payment of his damages. In the case at bar the Legislature passed a special act designed to afford the plaintiff relief by compensation for the damages sustained."

In a subsequent case filed by Sauer's administratrix, **People ex rel. Crane v. Ormond, et al.**, 221 New York 283, 116 N. E. 993, the Court held that a change in grade of the street had been effected and the plaintiff was entitled to proceed under a subsequent act of the New York Legislature to establish damages suffered as an abutting property owner to the viaduct. It, therefore, appears that the principle established in the **Sauer** case has either been made ineffective by legislative enactments or has been overruled by later decisions in various jurisdictions.

A leading case among the more recent decisions is that of **Liddick, et al. v. City of Council Bluffs, et al.**, 232 Iowa 197, 5 N. W. 2d 361. In a very exhaustive opinion the Supreme Court of Iowa, in a case wherein the facts are strikingly similar to the facts under consideration, held that rights to access, light, air, and view are "rights of property" protected by the constitutional provision that private property shall not be taken for public use without just compensation. The court in speaking of the word "property," quoting from the case of **State v. Superior Court**, 26 Wash. 278, 66 P. 385, said:

'It is used in the Constitution in a comprehensive and unlimited sense and so it must be construed . . . It need not be any physical or tangible property which is subject to a tangible invasion. The right to the use and position of a lot abutting onto a public street is property. The right to light and air and access is equally property and the modern authorities are uniform that these are rights which are guaranteed by constitutional provisions similar to ours.'

The Court also observed with respect to the term "property":

"We must, therefore, look beyond the thing itself, beyond the mere corporeal object for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of use, the right of exclusion, and the right of disposition."

The Court also discussed the rights of landowners to support, access,

light, air, flowing water, etc., and observed that these rights, wherever they exist and to the extent to which they are secured by law, are part and parcel of the owner's property rights in land.

The Court further stated:

> "It is uniformly recognized that an owner of property abutting on a street has every right in the street that any member of the public has and, in addition, by reason of his location, certain special rights, to wit, the right of ingress and egress and the right to light, air, and view . . . . and that these rights, whether the bare fee of the streets was in the lot owner or the city, were rights of property and, as such, ought to be and were as sacred from legislative invasion as his right to the lot itself."

Furthermore, in quoting from the case of **McCann v. Clarke County,** 149 Iowa 13, 127 N. W. 1011, with regard to the rights of an abutting property owner, the Court said:

> 'His right as one of the public is entirely different from his right to the highway as a means of enjoying the free and convenient use of his abutting property. This right is a special one and if it is of value to him, it is property which cannot be taken from him without compensation.'

The Court quoted from the case of **Old Colony and Fall River Railroad Company v. Inhabitants of Plymouth County,** 14 Gray, Mass. 155, in considering the construction of the constitutional provision relating to appropriating private property for public uses, by saying that the property owners "shall receive a reasonable compensation therefor and shall have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."

The Iowa Court also cited the case of **Pearsall v. Board of Supervisors,** 74 Mich. 558, 42 N. W. 77, for the principle that the term "taking" should not be used in any unreasonable or narrow sense.

After citing authorities from various jurisdictions throughout the United States, with respect to the property rights of abutting property owners, which cases hold that such rights cannot be destroyed or appropriated without liability, the Court held:

> "We now hold that the destruction of the rights of access, light, air, or view or the substantial impairment or interference with these rights of an abutting property owner in the highways or streets adjacent to his property by any work or structure upon such highways or streets intended for the improvement thereof, done by the State or any govern-

mental subdivision thereof, is a 'taking' of the private property of said owner within the purview and provisions of Section 18, Article 1 of our Constitution."

See also the recent cases of **Atchison Ice Co. v. City of Atchison** (1951), 172 Kan. 94, 238 P. 2nd 531 and **Hedrick v. Graham** (1957), 96 S. E. 2nd 123 (North Carolina)

Additional authorities are cited in Annotations in 40 A. L. R. 1322, 90 A. L. R. 794 A. L. R. 416, 25 L. R. A. (N. S.) 1268.

An examination of the cases in the appellate courts of Alabama does not reveal a case wherein the factual situation is the same as the factual situation under consideration. However, the Alabama courts have recognized certain principles which are applicable. In the case of **First National Bank v. Tyson**, 133 Ala. 459, 32 So. 144, 59 L. R. A. 339, and 91 Am. St. Rep. 46, in considering the question of the rights of abutting property owners to streets, the Court said:

"If we inquire what these rights are, we find that they are twofold: first, a right of access from the abutting property and a passage to and fro over it in all its extent and, second, a right of light, air, prospect and ventilation. These rights are quite different from each other and capable of being separately exercised and enjoyed. The right of light, air and ventilation may be enjoyed fully without the least exercise of the right of access and passage. That this right of light, air, prospect and ventilation exists is clearly established by the authority of this and other states."

The Court also observed in this case that:

"It is difficult to understand why an easement of view from every part of a public street is not like light and air a valuable right of which the owner of a building on the street ought not to be deprived by an encroachment upon the highway by a coterminous or adjacent proprietor. The right of view or prospect is one implied like other rights from the dedication of the street to public uses as was well said by the learned judge below in respect to this right. 'It seems to be a valuable right appurtenant to the ownership of land abutting on the highway and to stand upon the same footing as to reason with easement of motion, light, and air and to be inferior to them only in point of convenience or necessity and that an interference with it is inconsistent with the public right acquired by dedication.' "

Another consideration to be taken into account in the question here presented is whether or not the proposed elevated highway shall constitute an additional servitude upon the street which was not within the implied

contemplation of the dedicators or grantors at the time of the dedication or the grant. In this connection, in the case of **Western Railroad of Alabama v. Alabama Grand Trunk Railroad Company,** 96 Ala. 272, the Court said:

> "The great weight of authority, however, is in favor of the proposition that a railroad constructed upon a street in a city and operated with steam cars is an additional burden when the ultimate fee to the street is in the owners of the attingent property for which compensation must be paid and that is the doctrine approved by this Court. C. and W. Railroad Company v. Witherow, 82 Ala. 190 and authorities therein."

The Court further pointed out that such use of the street was foreign to any and all uses contemplated by the act of dedication in the absence of any statutory regulation to the contrary. See also **City Council of Montgomery v. Townsend,** 80 Ala. 489 and **Finnell v. Pitts,** 222 Ala. 290, 132 So. 2.

While the Alabama courts and other jurisdictions have held that an ordinary street railway was a legitimate use of the street for which a municipality was authorized to permit without violating any right of the owner of the fee, such holdings are clearly distinguishable from the **Western Railway** case.

As stated above, there appears to be no Alabama case which is decisive of the question here presented and, of course, the Attorney General cannot predict with any certainty how the Alabama Appellate Courts would rule in the event this question is presented to them. Furthermore, it is recognized that there is a line of cases in the Appellate Courts of states other than those wherein the cases above cited arose in which the holdings are contra. However, the above cited cases appear to express the more modern trend in such decisions and would probably be followed by the Alabama Courts.

In addition, it is also recognized that the Alabama Courts have held that the State of Alabama is not liable for consequential damages under Article I, Section 23 of the Constitution, supra, resulting from the construction or enlargement of public works where there is no taking, whereas municipalities and other corporations may be held liable under Article 12, Section 235 of the Constitution. **Finnell v. Pitts,** supra. However, it would appear from the factual situation described herein that the proposed construction would result in a "taking" of property, rather than in the causing of consequential damages.

It is, therefore, my opinion that the construction of the proposed elevated highway will impose an additional servitude upon the street affected, and the result will be the taking of property rights of the abutting property owners with respect to light, air, and view for which reasonable compensation must be paid.

Very truly yours,

JOHN PATTERSON
Attorney General

June 13, 1957

Honorable Morris Wimpee
President
City Board of Education
Oneonta, Alabama

City Board of Education—Warrants—Funds Trusts and Trustees —Opinions Overruled Modified or Distinguished.

1. Where city board of education has derived money from the sale of school warrants issued under the provisions of Article Four, Chapter Ten of Title 52, Code of Alabama 1940, for school building purposes and such funds cannot be either immediately or in a short time used for such purpose, the funds may be invested in short term treasury notes issued by the Government of the United States of America until they are needed for the trust requirements.

2. The opinion of March 19, 1942, reported in Quarterly Report of Attorney General, Volume 26, page 139, insofar as it conflicts with this opinion, is overruled.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion bearing date of June 6, 1957, is as follows:

"The City Board of Education of the City of Oneonta, Alabama, has recently instituted a building program for the schools within this school system.

"The City Board of Education has recently issued and sold Two Hundred Thirty Five Thousand Dollars of capital outlay school warrants, under the provisions of Article Four, Chapter Ten of Title 52, Code of Alabama of 1940 for school building purposes. These bonds were delivered to the purchaser on May 27, 1957 and the City Board of Education is now in possession of the proceeds from the sale of these warrants.

"The plans for the school buildings have not yet been approved by the State Department of Education, nor has any contract been let for the construction of aforesaid school buildings. The architect has furnished to the City Board of Education an estimate of a progress schedule and estimate of payment dates as the work progresses, with final payments being paid in July, 1958.

"We are writing you for an opinion as to whether or not The City Board of Education of the City of Oneonta can legally invest the unused proceeds of the school warrants, issued and sold under Article Four, Chapter Ten of Title 52, Code of Alabama of 1940 for school buildings purposes, in short term treasury notes issued by the Government of the United States of America, and by so doing partially offset the accruing interest on the school warrants issued and sold by The City Board of Education.

"This opinion is requested under the authority of Section 240, Title 55 of the Code of Alabama of 1940, as amended."

On March 19, 1942, this office held that where a county board of education has derived moneys from the sale of school warrants issued for the purpose of erecting a new school building, and due to the war crisis, such school building could not be erected, such funds may not be used to buy National Defense Bonds or other sound investment securities. Quarterly Report of Attorney General, Vol. 26, page 139.

Evidently, to meet the above holding, the Legislature of Alabama, by Act No. 156, General Acts 1943, page 141, authorized county and city boards of education to invest unused proceeds of any warrants sold under the provisions of Article 4 of Title 52, Code of Alabama 1940, in securities issued by the Government of the United States of America until such time as such proceeds can be used for the purposes for which the warrants were issued. The Act, however, applied only to investment of funds in cases where the proceeds of such warrants "cannot now be used for school building construction due to priority regulations of the Government of the United States." Such is not the case here so the Act cannot be used as authority for the investment of the funds under consideration.

After due consideration, I am of the opinion that in the absence of statutory or constitutional prohibition the general rule is well settled that where trust money cannot be applied either immediately or within a short time to the purposes of the trust, it is the duty of the trustee to make the fund productive by investment of it in some proper security. 65 C. J. 795, Section 672.

The above general rule was approved by the Supreme Court of Alabama in **Opinion of the Justices,** 244 Ala. 456, 13 So. 2d 559. In this case the court also stated, "The faith and credit of the United States is the foundation of all money values within its territory. If that be discredited, we have no financial security of any sort."

I am of the opinion, therefore, that investment of funds in short term treasury notes issued by the Government of the United States of America until they are needed for the trust requirements is a proper form of invest-

ment by a trustee. When the funds are needed, the securities should be reduced to cash and used for the purposes of the trust.

It results from what has been said above that your question should be answered in the affirmative.

The opinion of March 19, 1942, reported in Quarterly Report of Attorney General, Volume 26, page 139, supra, insofar as it conflicts with the views now expressed, is hereby overruled.

Yours very truly,

JOHN PATTERSON
Attorney General

June 14, 1957

Hon. David E. Dunn
Judge of Probate
Montgomery County
Montgomery, Alabama

Probate Court—Guardian and Ward—Officers and Offices.

1. General guardian serves during term of judge by whom appointed.

2. Term refers to the statutory period of time of an officer, and is not to be confused with the tenure of the officer.

Opinion by Assistant Attorney General Webb.

Dear Sir:

Your request for an official opinion bearing date of June 4, 1957, is as follows:

"Does the language of the Alabama Code of 1940, Title 21, Section 7, 'The term of office of such General Guardian continues during the term of the Judge by whom he is appointed' mean that the General Guardian, when appointed by the Probate Judge, serves the entire term for which the Judge appointing him was elected, or in the event the Probate Judge dies during the term for which he was elected, does the term of the General Guardian end with the death of the Probate Judge?"

In reference to your question above, it is my opinion that the death, or

removal otherwise before the expiration of his term, of a judge of probate does not vacate the office of general guardian for the county.

Title 21, Section 7, Code of Alabama 1940, provides in part:

". . . the term of office of such general guardian continues during the term of the judge by whom he is appointed. . . ."

As a general proposition of law, where the term is ambiguous, the interpretation giving the shortest term will be given. However, the term of the judge of probate in this State is not ambiguous. Title 13, Section 271, and Title 41, Section 16, Code of Alabama 1940, as well as Article 6, Section 155, Constitution of Alabama 1901, provide for a term of six years. They do not provide for a term of six years, unless sooner removed from office. Article 6, Section 158, Constitution of Alabama 1901, is equally clear on the subject of vacancies. It provides that the successor shall fill the unexpired term. This section does not provide for a new term on the removal of the incumbent.

It is well settled in this State, as in others, that "term of office" refers to the statutory period of time, not to the tenure of the person filling the office. The Supreme Court of Alabama in **State ex rel. Foster v. Rice,** 230 Ala. 608, 162 So. 292, stated:

"The term of an office, as fixed in the Constitution or statute creating the office, is not to be confused with the tenure of an officer. . . ."

It is, therefore, my opinion that the general guardian of a county is appointed for the term of the appointing judge of probate and he continues in office throughout this term, regardless of who may thereafter serve that term as judge of probate due to death, resignation, or impeachment of the appointing judge of probate.

Very truly yours,

JOHN PATTERSON
Attorney General

June 17, 1957

Honorable Otis R. Emmons
Sheriff
Escambia County
Brewton, Alabama

Constitutional Amendments—Escambia County—Funds—Sheriffs.

1. Amendment 93 to the Constitution of 1901 is not self-ex-

ecuting but is a mere limitation, and, thereby, requires the enactment of legislation to implement it.

2. In order for funds to be paid out of the Highway and Traffic Control Fund of Escambia County, there must be an enactment of the legislature authorizing the expenditure from said fund.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of May 10, 1957, is as follows:

"I would like to get your opinion on amendment No. 43 which was ratified by the voters of the State in 1952. It provides that all of the county's part of motor vehicle license receipts be placed in a special highway and traffic fund and that the money shall be used for the purpose of maintaining and constructing roads and bridges in the county and to enforce highway and traffic laws and regulations.

"I would like to have your opinion if the county board of revenue in Escambia County can pay all or any part of the salaries of the Chief Deputy Sheriff or the two jail guards, now being paid from the General Funds of the County, from the special highway and traffic funds.

Title 54, Section 3, as amended by Act No. 635, General Acts of 1949, page 976, provides, in pertinent part, as follows:

"Deputies.—In all counties of the State of Alabama in which the sheriff is not on a salary basis under and by virtue of a constitutional amendment, the sheriff of such county must have one chief deputy, and may have as many other deputies as he may think proper. . . . Said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county commissioners, board of revenue or other governing body of the county in which such chief deputy is appointed not less than eighteen hundred and not more than three thousand dollars ($3,000), payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or court of county commissioners of such county...."

Act No. 414, General and Local Acts of 1951 at page 739, a local act, provides, in pertinent part, as follows:

"Section 1. The governing body of Escambia County is hereby authorized and directed to fix, and provide for the payment of the compensation of the county jailers employed or appointed by the sheriff, the salary of each jailer to be fixed at not less than one thousand two hundred nor more than three thousand dollars per annum and be payable in equal monthly installments out of any funds in the county treasury not otherwise appropriated."

Act No. 342, General and Local Acts of 1951 at page 630, a local act, provides, in pertinent part, as follows:

"Section 1. The governing body of Escambia County is hereby authorized to pay, in its discretion, from any funds in the county treasury not otherwise appropriated, the compensation of a deputy sheriff, to be appointed by the Sheriff, and to be by him stationed at Atmore; PROVIDED, the compensation of such deputy shall not be less than one thousand two hundred dollars ($1,200) nor more than three thousand six hundred dollars ($3,600) per annum. The deputy sheriff provided for in this Act shall be in addition to all deputies sheriff heretofore authorized by law and he shall perform his duties and exercise his authority in such manner as the Sheriff may direct."

It appears from the above cited general law and the two local acts that the county governing body of Escambia County, Alabama is authorized to pay the salary of the chief deputy sheriff and the two jail guards now employed by the sheriff. Also, I am informed by your request for an opinion that the county governing body of Escambia County is, in fact, at the present time paying the salary of the chief deputy sheriff and the two jail guards from the general fund of the county.

Amendment No. 93 to the Constitution of Alabama 1901, ratified on November 19, 1952, provides as follows:

"No moneys derived from any fees, excises, or license taxes, levied by the state, relating to registration, operation, or use of vehicles upon the public highways except a vehicle-use tax imposed in lieu of a sales tax, and no moneys derived from any fee, excises, or license taxes, levied by the state, relating to fuels used for propelling such vehicles except pump taxes, shall be expended for other than cost of administering such laws, statutory refunds and adjustments allowed therein, cost of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights-of-way, payment of highway obligations, the cost of traffic regulation, and the expense of enforcing state traffic and motor vehicle laws. The provisions of this

amendment shall not apply to any such fees, excises, or license taxes now levied by the state for school purposes for the whole state or for any county or city board of education therein."

It appears from the amendment that moneys derived from fees, excises and license taxes obtained from the registration, operation or use of vehicles, and the fees, excises and taxes on fuels used by such vehicles can only be used for the purposes set out in said amendment. One of the purposes for which this money can be used is the enforcement of state traffic and motor vehicle laws.

After this amendment was ratified, the Department of Examiners of Public Accounts authorized the various county governing bodies to establish a fund entitled the Highway and Traffic Control Fund, into which the moneys obtained by virtue of this amendment could be placed, and out of which could be paid the expenses of enforcing the state traffic laws.

The question arises as to whether the moneys placed in the Highway and Traffic Control Fund, as a result of the above amendment, can be disbursed by the county governing bodies for enforcement of state traffic and motor vehicle laws without more, or will it be necessary to enact legislation to implement the Constitutional Amendment?

In re **Opinion of the Justices,** 40 So. 2d 330, the Supreme Court provided us with a test to be used in ascertaining whether a constitutional amendment is self-executing or not, and it is as follows:

"Enabling legislation is not always necessary for the proper execution of a constitutional provision, depending on whether from a consideration of the language used and the intrinsic nature of the provision itself it was intended as a present enactment complete in itself as settled legislation, or whether subsequent action by the legislature was contemplated to carry it into effect, and if the former it is regarded as self-executing. The necessity for enabling legislation is to be determined from a construction of the provision and, to be necessary, there must be some indication that something is left for the legislature to do or by its very nature the provision renders such future legislation necessary. Taylor v. Hutchinson, 145 Ala. 202, 40 So. 108; Miller v. Marx, 55 Ala. 322; see also Francis v. Peevey, 132 Ala. 58, 31 So. 372; Finklea v. Farish, 160 Ala. 230, 49 So. 366; Frost v. State ex rel. Clements, 153 Ala. 654, 45 So. 203; Gay v. State, 228 Ala. 253, 153 So. 767. For authorities in other jurisdictions, see Protest of Chicago, R. I. & P. Ry. Co., 160 Okl. 226, 16 P. 2d 855; Williams v. City of Norman, 85 Okl. 230, 205 P. 144; Matheny v. Independence County, 169 Ark. 925, 277 S.W. 22; State ex rel. and to Use of Kersey v. Pemiscot Land & Cooperage Co., 317 Mo. 41, 295 S.W. 78; City of Shidler v. H. C. Speer & Sons Co. et al., 10 Cir., 62 F. 2d 544."

Applying the test above prescribed to Amendment 93, supra, it is my opinion that the amendment is not self-executing but is merely a limitation on the use of the money derived from the sources specified.

Consequently, it is my further opinion that appropriate legislation must be enacted before the governing body of Escambia County, Alabama may expend the moneys now in the Highway and Traffic Control Fund for the purpose of enforcing state traffic and motor vehicle laws. **Weaver et al. v. Tidwell, County Treasurer,** 228 Ala. 169, 153 So. 218.

Very truly yours,

JOHN PATTERSON
Attorney General

June 25, 1957

Hon. Grover A. Bice
Mayor
Town of Thorsby
Chilton County
Thorsby, Alabama

Bonds—Funds—Municipalities—Statutes.

1. A municipality may not invest its surplus funds in revenue bonds issued by it pursuant to Act No. 756, General and Local Acts 1951, page 1307.

2. Statutes found in the same title, chapter and article of the Code of Alabama 1940, and which relate to the same subject matter, should be construed in pari materia.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, bearing date of June 3, 1957, is as follows:

"The municipal council of Thorsby is confronted with the following questions upon which it respectfully requests your official opinion.

"The Town of Thorsby is in the process of selling municipal revenue bonds for the purpose of constructing a building for industrial pur-

poses under the Wallace Act, (Title 37, Section 511, Subsection 20, et seq.); these bonds are set up to bear an interest rate of 3½%.

"1. May the Town Council of the Town of Thorsby purchase a part of this bond issue with funds of the municipality which are not needed for any other purpose, as an investment pursuant to Title 37, Section 273, Subsection 1, of the Code of Alabama, 1940?

"2. In the event the Town Council of Thorsby may legally invest funds of the municipality not needed for other purposes in these revenue bonds, would the members of the Town Council be subject to any form of civil liability in the event of default in any of said bonds?"

The bonds, which the Town of Thorsby is now issuing, are revenue bonds and are issued pursuant to Act No. 756, General and Local Acts 1951, page 1307. **Newberry v. City of Andalusia**, 257 Ala. 49, 57 So. 2d 629.

By virtue of Act No. 246, General and Local Acts 1943, page 203, any municipal funds not presently needed for other purposes may be invested in any obligation in which sinking funds are authorized to be invested pursuant to Title 37, Section 265, Code of Alabama 1940. Section 265, supra, reads in part as follows:

"All sinking funds provided for the retirement of bonds shall be invested in bonds of such subdivision, or in bonds of the United States, or in bonds of the State of Alabama, or in bonds of any county in the State of Alabama, or any municipal corporation of the State of Alabama, or deposited in bank on interest; . . . ."

Title 37, Section 273, Code of Alabama 1940, reads as follows:

"Any funds of any municipality or county, which may come into the hands of such county or municipality to the credit of any sinking fund, may be by such county or municipality invested in bonds of the United States, bonds of the State of Alabama, or of any county or municipality thereof, or in any public improvement bonds issued by any municipality in the State of Alabama, which are general obligations of such municipality."

Section 265, supra, and Section 273, supra, are both codified as part of Title 37, Chapter 6, Article 1, Code of Alabama 1940, and are statutes relating to the same subject matter. Therefore, they should be construed in pari materia. Cf. Quarterly Report of Attorney General, Vol. 24, page 146. Therefore, since a proper investment of municipal funds is limited to general obligation bonds under Section 273, supra, I am of the opinion that the same limitation should apply under Section 265, supra.

Premises considered, I am of the opinion that the Town of Thorsby may not invest its surplus funds in revenue bonds issued by it pursuant to Act No. 756, supra.

The above obviates the necessity of answering your second question.

Yours very truly,

JOHN PATTERSON
Attorney General

June 27, 1957

Hon. J. B. Hill, Superintendent
Alabama Boys Industrial School
Birmingham 6, Alabama

Alabama Boys Industrial School—Courts—Juvenile Courts—Juveniles.

1. Under the provisions of Title 52, Sections 590 and 591, Code of Alabama 1940, as amended by Act No. 172, General Acts 1945, p. 297, and Title 13, Section 350, et seq., Code of Alabama 1940, only those boys between the ages of twelve and sixteen years may be committed to the Alabama Boys Industrial School, and a boy who has reached his sixteenth birthday cannot be committed.

2. The juvenile court is the only court which can commit a boy to the Alabama Boys Industrial School.

3. There is no authority permitting a circuit court to place a boy on probation on the condition that he be committed to the Alabama Boys Industrial School after the boy has been convicted of a criminal offense.

Opinion by Assistant Attorney General Prestwood.

Dear Sir:

Your request for an official opinion, bearing date of May 14, 1957, is in pertinent part as follows:

"1. May a boy who is sixteen years of age or over be committed to the Alabama Boys Industrial School?

"2. May any court, other than a juvenile court, commit a boy to the Alabama Boys Industrial School?

"3. Is there any authority permitting a circuit court to place a boy on probation on the condition that he be committed to the Alabama Boys Industrial School after the boy has been convicted of a criminal offense?"

There are several statutory provisions which will have to be examined in connection with answering your first question.

Title 52, Section 590, Code of Alabama 1940, as amended by Act No. 172, General Acts 1945, p. 297, provides that the Alabama Boys Industrial School "shall receive . . . white boys **between the ages of twelve to sixteen, inclusive,** who shall be committed to the school by the juvenile courts of the counties in which they reside or in which they are found. No boy shall be admitted to the school except by commitment of such juvenile court and unless such court finds the boy delinquent under the meaning of the words 'delinquent child' as defined in the juvenile court law of this state and declares him a ward of the state." (Emphasis supplied.)

This statute is confusing at least insofar as the phrase "between the ages of twelve to sixteen, inclusive," is concerned. I believe, however, that it is necessary to construe this phrase to mean from twelve to sixteen years of age in order to make this statute consistent with other legislation in this field. When two statutes cover the same general subject matter, they must be construed in pari materia, and both must be given effect, if possible. **Homewood Dairy Products Co. v. Robinson**, 254 Ala. 197, 48 So. 2d 28; **Shull v. Shull**, 252 Ala. 320, 40 So. 2d 708.

Title 52, Section 591, Code of Alabama 1940, as amended by Act No. 172, General Acts 1945, p. 297, provides that "(A)ny judge of a juvenile court of this state may cause to be brought before him on his own motion or on the sworn complaint of another any white boy **between the ages of twelve and sixteen, inclusive,** who shall be alleged to be a delinquent child within the meaning of such term as defined in the juvenile court law of this state," and that such boy may be committed to the Alabama Boys Industrial School. The fact that Section 591, as amended, supra, employs the phrase "between the ages of twelve and sixteen, inclusive" might seem to indicate that the legislature did intend to include all boys under seventeen. (Emphasis supplied.) This could not, however, have been the legislative intent because under Title 13, Section 350, et seq., Code of Alabama 1940, a juvenile court judge only has jurisdiction **originally** to deal with children under sixteen years of age. I say **originally** because a case involving a child between the ages of sixteen and eighteen may be transferred to the juvenile court by the magistrate of some other court under Title 13, Section 363, Code of Alabama 1940. So far as I know, such a transfer is the only way

in which a boy over sixteen years of age can be brought before a juvenile court.

I am of the opinion that Sections 590 and 591, as amended, supra, taken together, clearly contemplate cases which might have been originally brought before the juvenile court, and that of necessity would include only cases involving children under sixteen years of age.

I believe the view I express receives a great deal of weight from the fact that both Sections 590 and 591, as amended, supra, indicate that the boy who is committed to the school must be a delinquent child "as defined in the juvenile court law of this state." The definition of "delinquent child," as found in our juvenile court statute (Title 13, Section 350, supra), is any child who "while under sixteen years of age violates any penal law." (Emphasis supplied.)

This construction of Section 590 and 591, as amended, supra, is not an unusual one. The word "to" has been universally considered a word of exclusion, and the phrase "between the ages of twelve and sixteen" is very clear. The addition of the word "inclusive" does not necessarily extend the time limit beyond that specifically designated. See **Jackson v. Mason**, 145 Mich. 338, 108 N. W. 697.

I think the strongest argument against the position I have taken comes in the form of the statute covering cases of boys between the ages of sixteen and eighteen who are transferred to the juvenile court. Title 13, Section 363, supra, provides that when a case is so transferred, the child is "to be dealt with as a delinquent child under the terms of this chapter and when so transferred such child shall come under all terms and conditions of this chapter and be so dealt with as other children are dealt with under this chapter." Title 13, Section 361, Code of Alabama 1940, which is in the same chapter, provides that the juvenile court may "commit by final order any delinquent child coming within its custody and control to any appropriate state institution which is now or may hereafter be established to receive and care for delinquent children." The general language of these two statutes would seem to indicate that a child who is sixteen to eighteen can be dealt with as a delinquent child in all respects and committed to the school once his case is transferred to the juvenile court. This general language, however, must fall before the specific language in Sections 590 and 591, as amended, supra. The phrases "between the ages of twelve to sixteen, inclusive," and "twelve and sixteen, inclusive," rule out any remote possibility that the legislature meant to admit boys to the school until they were eighteen years old. Also, while Section 363 of Title 13, supra, does say that a boy sixteen to eighteen who is transferred will be dealt with as if he were a delinquent child, such a boy is never declared to be a delinquent child. Sections 590 and 591, as amended, supra, state that the boy admitted must be a delinquent child "as defined in the juvenile court law." (Emphasis supplied.)

Another strong reason for holding as I do is that it has been established in Alabama that a person reaches or becomes a designated age on the day preceding the anniversary of his birth. See **Frost v. State ex rel. Clements,** 153 Ala. 654, 45 So. 203; Quarterly Report of Attorney General, Vol. 73, p. 81. Technically, therefore, when a boy reaches his sixteenth birthday he is over sixteen years of age, and does not come within the meaning of the phrase "between the ages of twelve to sixteen, inclusive."

While the legislation in this field is definitely fragmentary and unclear, there seems to be no alternative but to answer your first question in the negative.

It is my opinion also that questions numbered 2 and 3 must be answered in the negative. Section 590, as amended, supra, provides in part as follows:

> ". . . **No boy shall be admitted except by commitment of such juvenile court.** . . ." (Emphasis supplied.)

To me, it is clear beyond cavil that by this language the legislature intended to grant to the juvenile court, and to that court only, the power to commit a boy to the Alabama Boys Industrial School. However, if any further evidence of the legislative intent is needed, I think it may be found in Section 591, as amended, supra. Prior to the 1945 amendment, that section provided that commitments could be made by a supreme court justice, a judge of the court of appeals, judge of probate, circuit judge, or judge of any criminal court of the State. The 1945 amendment, however, rewrote this section and deleted all the above magistrates and inserted only one, the judge of the juvenile court. In view of this legislation, there is no doubt but that the juvenile court is the only court which can commit a boy to the Alabama Boys Industrial School, and that no boy can be committed without an order from said court.

Very truly yours,

JOHN PATTERSON
Attorney General

Honorable Hugh S. Patterson
Mayor
City of Gadsden
Gadsden, Alabama

Municipalities—Labor—Employment, Employers and Employees.

1. Municipality may constitutionally condition public employment of firemen and policemen upon non-membership in a labor union.

2. Municipality may constitutionally condition public employment of employees other than firemen and policemen upon non-membership in unions, national or international in scope, and whose rules and constitutions require collective bargaining with municipal authorities.

3. Municipality may not, in absence of constitutional or statutory authority, recognize labor union and lawfully enter into a contract with it concerning wages, hours of employment and working conditions.

4. Municipal employees may not lawfully strike or picket or conduct a work stoppage against the municipality whether members of a union or not, and such action may be enjoined by the city.

5. Where membership of city employees in labor union is not prohibited, city may, in its discretion, deduct dues from wages of such an employee at his expense, upon being requested to do so by a voluntary written authorization of the employee, and pay the dues to the union designated by the employee.

6. The Solomon Act, Act No. 720, General and Local Acts 1953, page 974, does not authorize city employees to join labor unions.

Opinion by Assistant Attorney General Madison.

Dear Sir:

Your request for an official opinion, bearing date of June 18, 1957, is as follows:

"There is attached hereto, in duplicate, two resolutions which have been unanimously passed by the City Commission of the City of Gadsden in accordance with the prescribed statutes formally requesting opinions of your office.

"I believe that you will find that each resolution is self explanatory, but if there is any further information which you require please telephone me, or have someone call and I will supply the additional data which you may require."

"RESOLUTION

"BE IT RESOLVED BY THE CITY COMMISSION OF GADSDEN, ALABAMA, that the Attorney General of Alabama be requested to give

his opinion in writing to the City Commission on the following questions of law:

"1. (a) Can a municipality lawfully enter into a contract with a labor organization or union concerning grievances, wages and conditions of work?

"(b) Can a labor organization or union, of which City employees are members, lawfully demand or require the City to recognize it as such and enter into a contract with the labor organization or union.

"2. Should a labor organization or union of which employees of the City are members, demand the City to recognize it as the representative of the employees and enter into a contract with it concerning grievances, wages and working conditions and the City declines to do so, is it lawful for such labor organization or union to conduct a strike against the City to enforce its demands?

"3. May such labor organization or union lawfully engage in a work stoppage, concerted action or picketing, peaceful or otherwise, in efforts to induce or prevent others not to be employed by the City or not to perform work for the City in its municipal functions.

"4. In the event a union, its members or sympathizers conduct a strike, or a work stoppage or concerted action or picketing in furtherance of the strike is the City empowered and authorized by law to institute suit in its name for an injunction to restrain and prevent the union, its members, and sympathizers from conducting a strike, work stoppage, concerted action, or picketing and execute such bond as may be required for the issuance of temporary injunction.

"5. To what extent, if any, is it lawful for a union or its members or any other persons to cause or instigate against a City a strike, picketing, work stoppage or concerted action to hinder, delay or prevent the City from performing its municipal functions.

"6. Can a municipality require (1) policeman (2) fireman (3) street and sanitary employees or any other employees of the municipality not to belong to a labor union either as a condition precedent to employment or as a condition subsequent to the continuation of employment.
"7. Has 1953 Acts p. 975 No. 720 known as the Solomon Act changed the law as it existed prior to its passage with respect to any of the propositions stated above?

"8. (a) Can the City lawfully deduct dues from the wages or salary of an employee upon being requested to do so by a voluntary written authorization and pay the dues to the union designated by the employee.

"(b) If your answer to the above is in the affirmative can the employee revoke such request at any time.

"THIS RESOLUTION PASSED AND ADOPTED this the 18th day of June, 1957."

Question numbered 1, (a) and (b), is answered in the negative.

The manner in which public authorities determine the wages, hours and working conditions of public employees is governed entirely by the constitution, statutes, municipal charters, civil service rules, regulations and resolutions setting out the authority of the public employer. These matters never have been and cannot become a matter of collective bargaining and contract in the absence of constitutional or statutory authority to the contrary. **City of Springfield v. Clouse,** 356 Mo. 1239, 206 S.W. 2d 539; **Mugford v. Mayor and City Council of Baltimore,** 44 A. 2d 745, 162 A.L.R. 1101; **Miami Water Works Local No. 654 v. City of Miami,** 26 So. 2d 194, 165 A.L.R. **C.I.O. v. Dallas,** 198 S.W. 2d 143; **Railway Mail Ass'n. v. Murphy,** 44 N. Y. S. 2d 601; **Hickman v. City of Mobile,** 256 Ala. 141, 53 So. 2d 752; 31 A.L.R. 2d 1142-1180. Quarterly Report of Attorney General, Vol. 23, page 55; Vol. 44, page 36; Vol. 45, page 19; Vol. 45, page 43; letter of February 27, 1957, to Etowah County Board of Revenue.

Questions numbered 2 and 3 are answered in the negative.

As stated in **Norwalk Teachers' Ass'n. v. Board of Education of City of Norwalk,** 138 Conn. 269, 83 A. 2d 482, under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle. It has been so regarded by the heads of the executive departments of the states and the nation. Most of the text writers refer to one or more of the following statements by three of our recent presidents, "There is no right to strike against public safety by anybody anywhere at any time (Calvin Coolidge on the Boston police strike). This same strike was characterized by President Wilson as "an intolerable crime against civilization." President Franklin D. Roosevelt said in a letter to the president of the National Federation of Federal Employees, on August 16, 1937:

"Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees . . . A strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward

the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable."

See also **Miami Water Works Local No. 654 v. Miami**, supra; **Los Angeles v. Los Angeles Building and Constr. Trades Council**, 210 Pac. 2d 305; **United States v. United Mine Workers**, 330 U. S. 258, 290.

Question numbered 4 is answered in the affirmative. 31 A.L.R. 2d at page 1176; and cases, supra.

Question numbered 5 is answered by saying that it is not lawful to any extent. The city has the legal right to prevent a union or its members or any other person from causing or instigating against the city a strike, picketing, work stoppage or concerted action to hinder, delay or prevent the city from performing its municipal functions, and the union cannot lawfully prevent injunctive proceedings by the city, to prevent or enjoin such actions. Cases, supra.

Question numbered 6 is answered as follows:

The special semi-military problems of discipline have resulted in judicial decisions sustaining the right of a city to prohibit policemen and firemen from belonging to a labor union, either as a condition precedent to employment or as a condition subsequent to the continuation of employment. The police and fire departments are in a class apart. Both are at times charged with the preservation of the public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained. **Hickman v. City of Mobile**, supra; **Carter v. Thompson**, 164 Va. 312, 180 S.E. 410, 412; **King v. Priest**, 357 Mo. 68, 206 S.W. 2d 547, appeal dismissed, 333 U. S. 852, rehearing denied, 333 U. S. 878; **State Lodge of Michigan, Fraternal Order of Police v. City of Detroit**, 318 Mich. 182, 27 N.W. 2d 612, certiorari denied, 332 U. S. 818; **City of Jackson v. McLeod**, 199 Miss. 676, 24 So. 2d 319, certiorari denied, 328 U. S. 863; **Fraternal Order of Police v. Harris**, 306 Mich. 68, 10 N.W. 2d 310, certiorari denied, 321 U.S. 784; **Perez v. Board of Police Commissioners of the City of Los Angeles**, 178 Pac. 2d 537; **Hutchinson v. Magee**, 122 A. 234; **McNatt v. Lawther**, 223 S.W. 503; **San Antonio Fire Fighters Local v. Bell**, 223 S.W. 506; **H. L. Verhaagen, et al. v. Sherwood Reeder, et al.**, Law and Chancery Court of City of Norfolk, No. 6009, decree dated November 28, 1955, petition for appeal denied by Supreme Court of Appeals of Virginia, September 3, 1956, certiorari denied, United States Supreme Court Case No. 603, May 27, 1957.

As to street and sanitary employees or any other employees of the municipality, the municipality may legally condition public employment upon non-membership in a labor union, which is national or international in scope and purpose and whose rules and constitution have as an objective, collective bargaining with municipal authorities. **Hickman v. City of**

Mobile, supra; **C.I.O. v. Dallas**, supra; **King v. Priest**, supra; **Government and Civic Employees Organizing Committee, C.I.O. v. Windsor**, 116 F. Supp. 354, also 262 Ala. 285, 78 So. 2d 646.

Question numbered 7 is answered in the negative.

The fact that the Solomon Act provided that it should not apply to employees of cities or counties did not, in my opinion, authorize union membership for such employees but left such matters for the determination of the local governing authorities.

Question numbered 8(a) cannot be answered either yes or no. If the employee is legally prohibited by ordinance from joining a labor union, the city could not, of course, deduct dues under such circumstances and remit to the union designated by the employee. On the other hand, if there is no prohibition against employees of the City of Gadsden belonging to a labor union, such dues may, in the city's discretion, be deducted from the wages or salary of an employee, at the expense of each individual employee, upon being requested to do so by a voluntary written authorization of the employee. In such case, in answer to question numbered 8(b), the employee may revoke the request at any time. **Mugford v. Mayor and City Council of Baltimore**, supra; **Kirkpatrick v. Reid**, 85 N.Y.S. 2d 378.

In reaching the above conclusions, due consideration has been given to Alabama's Right to Work Law, (Act No. 430, General and Local Acts 1953, page 535) but that law, in my opinion, does not apply to public employment. **Springfield v. Clouse**, supra; **Miami Water Works Local No. 654 v. Miami**, supra; **H. L. Verhaagen, et al. v. Sherwood Reeder, et al.**, supra; **C.I.O. v. Dallas**, supra.

Inapplicable also is the principle of law that constitutional protection does extend to the public servant whose exclusion pursuant to a statute or ordinance is patently arbitrary or discriminatory. **Wieman v. Updegraff**, 344 U.S. 183; **Slochower v. Board of Higher Education**, 350 U.S. 551, 555. Statutes or ordinances proscribing public employment because of union membership, under the circumstances discussed herein, would not be unreasonable or discriminatory.

It does not follow, however, from what has been said above that employees may not designate a representative or spokesman to present grievances, for there may be a difference, a constitutional difference, between the presentation of grievances and collective bargaining. As to this, I express no opinion as that question is not presented.

Yours very truly,

JOHN PATTERSON
Attorney General

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